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9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN FRANCISCO DIVISION**

12 IN RE: FACEBOOK, INC. CONSUMER
13 PRIVACY USER PROFILE LITIGATION

MDL No. 2843
Case No. 18-md-02843-VC-JSC

14 This document relates to:
15 ALL ACTIONS

**PLAINTIFFS' RESPONSE TO
STATEMENT IN SUPPORT OF
FACEBOOK'S ADMINISTRATIVE
MOTION TO FILE UNDER SEAL**

16 Judge: Hon. Vince Chhabria and
17 Hon. Jacqueline Scott Corley
Courtroom: 4, 17th Floor

1 Pursuant to Civil Local Rule 7-11, Plaintiffs submit this response to the Statement in
 2 Support of Facebook, Inc.'s Administrative Motion to File Under Seal ("Administrative Motion")
 3 or "Admin. Mot."), Dkt. No. 700, and respectfully request the Court strike portions of the
 4 Declaration of Alexander H. Southwell in Support of Facebook's Administrative Motion to File
 5 Under Seal ("Southwell Declaration" or "Southwell Decl."), Dkt. No. 700-1.

6 Plaintiffs take no position at this time regarding whether the Court should seal the
 7 information Facebook identifies as confidential. Nevertheless, Plaintiffs file this response for two
 8 reasons. First, Facebook seeks to import the privilege afforded discussions that occur during
 9 settlement mediation into the parties' disclosures during discovery mediation. Such
 10 communications are not privileged, and that the communications were made to Plaintiffs during
 11 discovery mediation is not an appropriate ground for confidentiality.

12 Second, the Southwell Declaration contains self-serving assertions that are not statements
 13 of fact. Specifically, Mr. Southwell purports to state as fact contested issues about the App
 14 Developer Investigation ("ADI") that he participated in as Facebook's outside counsel, including
 15 Facebook's reason for initiating the ADI. Mr. Southwell is not qualified to provide a declaration
 16 on Facebook's state of mind, nor are these assertions relevant to Facebook's Administrative
 17 Motion. The self-serving statements are, however, directly relevant to the parties' ongoing ADI
 18 dispute and are contradicted by the Court's initial view that the ADI is not entirely confidential.
 19 The statements are also contradicted by Facebook's public statements identifying the ADI's
 20 purpose. *See, e.g.*, Melamed Decl., Exs. A-C. Thus, the offending portions of the Southwell
 21 Declaration, ¶¶ 2-6, should be stricken.

22 A. **"Mediation Privilege" Does Not Apply to the Parties' Communications
 23 Regarding Discovery Disputes**

24 Facebook's Administrative Motion asserts that certain information it communicated to
 25 Plaintiffs during discovery is subject to mediation privilege, is confidential, and should be
 26 permanently sealed. Dkt. No. 700 at 2. This assertion improperly transposes the privilege
 27 afforded mediation discussions concerning settlement onto the parties' ongoing efforts to mediate
 28

1 certain discovery disputes.

2 The mediation privilege as commonly understood applies solely to settlement discussions.
 3 28 U.S.C. § 652(d) requires district courts to adopt provisions providing for the confidentiality of
 4 alternative dispute resolution, which this Court has done in ADR L.R. 6-12. Those provisions,
 5 however, concern mediation as a “flexible, non-binding, confidential process in which a neutral
 6 person (the mediator) facilitates *settlement negotiations.*” ADR L.R. 6-1. Similarly, Federal Rule
 7 of Evidence 408 prohibits the use of settlement offers to prove or disprove the validity or amount
 8 of a disputed claim or for impeachment. It, too, only addresses settlement negotiations.

9 So, too, do each of the cases Facebook cites for the proposition that “[c]ourts routinely
 10 seal confidential information revealed in mediation pursuant to the mediation privilege.” Admin.
 11 Mot. at 3. *See Facebook, Inc. v. ConnectU, Inc.*, 2008 WL 11357787, at *3 (N.D. Cal. July 2,
 12 2008) (allowing a confidential settlement to remain privileged because it ““serves a sufficiently
 13 important public interest””) (citation omitted).¹ Though Facebook quotes *ConnectU* as holding
 14 there is a “‘very low or nonexistent’ presumption of public access to information revealed in
 15 mediation,” Admin. Mot. at 3, it omits that this statement was specifically made regarding “the
 16 necessity for secrecy *in settlement terms and negotiations.*” *Id.* at *3 (emphasis added).

17 Without explanation, Facebook seeks to graft the protections afforded settlement
 18 negotiations onto disclosures to Plaintiffs during discovery dispute negotiations. This Court’s
 19 standing order *requires* that submissions of discovery disputes “provide each party’s final
 20 proposed compromise[.]” Civ. Standing Order for Mag. Judge Jacqueline Scott Corley at 4.
 21 Information provided to an adversary and that is required to be provided to the Court is
 22 definitionally not privileged.

23 Nor is it necessarily confidential. As Judge Chhabria stated during the June 24, 2021

24

25 ¹ *See also Microsoft Corp. v. Suncrest Enter.*, 2006 WL 929257, at *2 (N.D. Cal. Jan. 6, 2006)
 26 (mediation privilege applies to discussions during mediation aimed at settlement); *Folb v. Motion*
Picture Industry Pension & Health Plans, 16 F. Supp. 2d 1164, 1167, 1180 (C.D. Cal. 1998)
 27 (mediation privilege applies to settlement negotiations); *cf. In re Global Equity Mgmt. (SA) Party*
Ltd., 2020 WL 4732210, at *1 (N.D. Cal. Aug. 15, 2020) (mediation discussions of fees and costs
 28 are privileged).

1 hearing in this case: “[T]he issue of confidentiality, when we are talking about mediating
 2 discovery disputes, is just so much less of a big deal. It just doesn’t seem like a big deal at all to
 3 me.” June 24, 2021 Hr’g. Tr. 20:23-21:1. Thus, the mere fact that the information Facebook
 4 seeks to seal was disclosed during discovery mediation is not an adequate ground for sealing.

5 Facebook has provided an alternative ground for sealing: that the information reveals
 6 aspects of Facebook’s ADI investigation. Admin. Mot. at 4. Plaintiffs disagree that the ADI
 7 investigation is, as Facebook asserts, privileged or confidential, and that issue is the subject of
 8 separate briefing to the Court. Dkt. Nos. 611, 613, 615, 699. Plaintiffs do not take issue with
 9 Facebook sealing information that would reveal purportedly confidential aspects of the ADI
 10 investigation pending the Court’s resolution of the threshold issue—whether the ADI
 11 investigation is subject to work-product protection.

12 **B. The Court Should Strike ¶¶ 2-6 of the Southwell Declaration Because They
 13 Have No Bearing on the Administrative Motion**

14 Paragraphs 2-6 of the Southwell Declaration should be stricken. They do not address
 15 grounds for filing under seal, but rather reflect self-serving hearsay and legal conclusions
 16 regarding whether the ADI itself was subject to privilege. Whether and, if so, the extent to which
 17 the ADI is privileged has been the subject of extensive briefing by the parties. *See* Dkt. Nos. 611,
 18 613, 615, 699. The Court has already indicated that, at a minimum, certain facts regarding the
 19 ADI are discoverable (*see* April 6, 2021 Hr’g Tr. 24:15-25:7), directly contradicting the self-
 20 serving assertions made in the Southwell Declaration. Facebook should not be permitted to
 21 submit argument, disguised as a declaration, purporting to identify “facts” regarding the purpose
 22 of the ADI or the manner in which it was conducted in support of its Administrative Motion to
 23 seal.

24 The Southwell Declaration purports to identify the reason Facebook initiated the ADI.
 25 Southwell Decl. ¶ 2. It purports to identify the reason Facebook retained Gibson Dunn and the
 26 role it played on the ADI. *Id.* ¶¶ 3-4. It purports to discuss the method for devising the manner in
 27 which the ADI proceeded. *Id.* ¶ 5. And it purports to state that Facebook has taken steps to keep
 28

1 the ADI privileged and highly confidential. *Id.* ¶ 6. None of these assertions bear on whether
 2 Facebook's Administrative Motion should be granted. Indeed, since Facebook has *disclosed* to
 3 Plaintiffs and the Court the information it seeks to seal, discussions of the purportedly privileged
 4 purpose of the ADI are irrelevant.

5 Nor should these assertions be taken as truth. For example, Mr. Southwell asserts that
 6 Facebook initiated the ADI because it "anticipated it would have to respond to known and
 7 expected legal challenges." Southwell Decl. ¶ 2. This assertion illuminates the impropriety of his
 8 declaration in this context. Mr. Southwell cannot speak with personal knowledge about the
 9 reason Facebook initiated the ADI; his knowledge is limited to what he was told by Facebook.
 10 Moreover, Mr. Southwell's hearsay is contradicted by Facebook's public statements about the
 11 ADI investigation.

12 On March 21, 2018, Mark Zuckerberg posted "an update on the Cambridge Analytica
 13 situation." Melamed Decl., Ex. A. Mr. Zuckerberg stated that Facebook initiated the ADI
 14 because Facebook owed a duty to its users. "We have a responsibility to protect your data, and if
 15 we can't then we don't deserve to serve you. I've been working to understand exactly what
 16 happened and how to make sure this doesn't happen again." He continued by discussing the steps
 17 involved in the ADI and informed users that Facebook "will learn from this experience to secure
 18 our platform further and make our community safer for everyone going forward."²

19 On May 14, 2018, VP of Product Partnerships Ime Archibong posted "An Update on Our
 20 App Investigation and Audit." Melamed Decl., Ex. B. Like Mr. Zuckerberg, Mr. Archibong
 21 stated that the ADI was about reassuring Facebook's users. "There is a lot more work to be done
 22 to find all the apps that may have misused people's Facebook data—and it will take time," Mr.
 23 Archibong wrote. "We are investing heavily to make sure this investigation is as thorough and
 24 timely as possible. We will keep you updated on our progress." A promise to keep users updated
 25 on the ADI's progress is inconsistent with an assertion of privilege (or confidentiality).

27 ² Later posts make clear that Zuckerberg was discussing the ADI. *E.g.*, Ex. B ("Here is an update
 28 on the app investigation and audit that Mark Zuckerberg promised on March 21.").

1 And on September 20, 2019, Facebook provided the promised update. Melamed Decl.,
 2 Ex. C. Mr. Archibong continued to discuss the ADI in the context of business, not litigation,
 3 purposes. “We promised that we would review all of the apps that had access to large amounts of
 4 information before we changed our platform policies in 2014. . . . Our review helps us to better
 5 understand patterns of abuse in order to root out bad actors among developers.” Neither Mr.
 6 Zuckerberg’s nor Mr. Archibong’s public statements indicated that Facebook initiated the ADI to
 7 address known or expected legal challenges.³

8 In sum, Mr. Southwell does not declare true and correct facts. He improperly submits
 9 argument regarding the underlying dispute between the parties addressed in a separate motion,
 10 and his argument is directly contradicted by Facebook’s public statements. If the Court does not
 11 strike ¶¶ 2-6 of the Southwell Declaration, it should consider permitting Plaintiffs to pursue
 12 discovery from Mr. Southwell concerning the purported facts he sets forth, since he has now
 13 attempted to insert himself as a fact witness in these proceedings.

14

15 Dated: July 13, 2021

16 KELLER ROHRBACK L.L.P.

17 By: /s/ Derek W. Loeser
 Derek W. Loeser

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Respectfully submitted,

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26 ³ Even statements by Facebook’s counsel in this action, one of Mr. Southwell’s colleagues,
 27 undercut his contention. In an April 6, 2021 hearing before the Court, Facebook’s counsel stated
 28 that ADI “was set up for the reason you said[,] because we wanted to assure our users that the
 29 platform, you know, was safe and had been safe in the past.” April 6, 2021 Hr’g. Tr. 22:25-23:3.

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Plaintiffs' Co-Lead Counsel

1 **ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1(i)(3)**

2 I, Lesley E. Weaver, attest that concurrence in the filing of this document has been
3 obtained from the other signatories. I declare under penalty of perjury that the foregoing is true
4 and correct.

5 Executed this 13th day of July, 2021, at Oakland, California.

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7 /s/ Lesley E. Weaver

8 Lesley E. Weaver

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CERTIFICATE OF SERVICE

I, Lesley E. Weaver, hereby certify that on July 13, 2021, I electronically filed the foregoing with the Clerk of the United States District Court for the Northern District of California using the CM/ECF system, which shall send electronic notification to all counsel of record.

/s/ Lesley E. Weaver

Lesley E. Weaver